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IN THE

Supreme Court of the United States

October Term, 1960.

No. 530

[illegible]ON MENDE,

Petitioner,

vs.

[illegible]ED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

		PAGE
(a)	Opinions delivered in courts below	1
(b)	Jurisdiction of this court	2
(c)	Questions presented for review	2
(d)	Constitutional and statutory provisions involved	3
(e-g)	Statement of the case	5
(h)	Reasons for granting Writ of Certiorari	10

Appendix "A"—

Opinion of the United States Court of Appeals for the Ninth Circuit	App. p. 1
Order on motion for rehearing	App. p. 7
Judgment of Court of Appeals	App. p. 8

TABLE OF AUTHORITIES CITED

CASES — PAGE

Grunewald v. United States, 77 S. Ct. 963, 353 U. S. 391 15

Ilseng v. United States, 120 F. 2d 823, cert. den. 62 S. Ct. 126, 314 U. S. 665 ..... 14, 15

Robinson v. United States, 33 F. 2d 238 ..... 14, 15

United States v. Durkee Famous Foods, 59 S. Ct. 456, 306 U. S. 68 11

United States v. Gross, 159 Fed. Supp. 316 11

United States v. Laut, 17 F. R. D. 31 11

United States v. Mendoza, 122 Fed. Supp. 367 11

United States v. Satz, 109 Fed. Supp. 94 11

United States v. Udell, 109 Fed. Supp. 96 11

RULES

Revised Rules of the Supreme Court, Rule 23 1

STATUTES

United States Code, Title 18, Sec. 1341 4

United States Code, Title 18, Sec. 3282 ..... 4, 8, 12

United States Code, Title 18, Sec. 3288 ..... 2, 4, 8, 10, 11, 12

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 28, Sec. 1732(a) 2, 5, 9, 10

United States Constitution, Amendment V 3, 16

IN THE

Supreme Court of the United States

October Term, 1960.

No. .....

MILTON MENDE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 23, Revised Rules of the Supreme Court of the United States, your petitioner respectfully shows:

(a) Opinions Delivered in Courts Below.

The opinion of the United States Court of Appeals for the Ninth Circuit from which petitioner seeks a writ of certiorari has not yet been reported. The opinion of the Court of Appeals as filed, together with the modification as contained in the order denying rehearing, are printed in the Appendix A, annexed to this petition, in support thereof.

(b) Jurisdiction of This Court.

(i) The judgment of the United States Court of Appeals was made and entered on September 26, 1960.

(ii) Rehearing was sought, and was denied on October 25, 1960. Also, on October 25, 1960, an order was granted by the United States Court of Appeals staying issuance of mandate pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before November 25, 1960.

(iii) Jurisdiction of the Supreme Court of the United States is invoked under Title 28, United States Code, Section 1254 (1), providing for a review of a decision rendered by the Court of Appeals by writ of certiorari.

(c) Questions Presented for Review.

1. Does Section 3288 of Title 18, United States Code, which provides that when an indictment is found defective after the period prescribed by the statute of limitations "a new indictment" may be returned, authorize the return of more than one new indictment covering the same alleged offense?

2. For business books and records to be admissible into evidence in a criminal case under the provisions of Title 28, United States Code, Section 1732 (a), must the foundation requirements of such section be substantially complied with, or are such books and records self-executing?

3. Where several defendants are charged jointly in substantive counts, of having devised a scheme to de-

fraud, does such a charge so partake of the elements of conspiracy as to make available to the prosecution the rules of evidence in conspiracy cases which make the acts or declarations of one conspirator admissible against his co-conspirators, whether or not in his presence or with his knowledge?

4. If the answer to the last question is in the affirmative, should the acquittal of the defendant charged with the act or declaration, taken or made outside the presence of the convicted co-defendant, be considered in determining the sufficiency of the evidence?

5. Where there are multiple defendants in a criminal case and a defendant elects to produce no evidence and rests his case at the conclusion of the presentation of its case in chief by the prosecution, can evidence thereafter introduced by co-defendants be considered in determining the guilt or innocence of the defendant who had previously rested?

(d) Constitutional and Statutory Provisions Involved.

The following constitutional and statutory provisions are involved:

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . .: nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; . . . nor (shall any person) be deprived of life, liberty, or property, without due process of law; . . ."

Title 18, United States Code, Section 1341:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department . . . (punished as in such statute provided)."

Title 18, United States Code, Section 3282:

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

Title 18, United States Code, Section 3288:

"Whenever an indictment is dismissed for any error, defect or irregularity with respect to the grand jury, or is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned no later than the end of the next succeeding regular term of such court, following the term at which such indictment was found defective or insufficient, during which a grand jury shall be in session which new indictment shall not be barred by any statute of limitations."

Title 28 States Code, Section 1732(a):

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

(e-g) Statement of the Case.

Petitioner was found guilty by a jury in the United States District Court of nine substantive counts charging use of the United States mails in furtherance of a scheme to defraud radio stations by obtaining credit for broadcasting advertising without intent to pay therefor, in violation of Title 18, United States Code, Section 1341 (*supra*). All defendants, including petitioner, were acquitted on all counts charging them with the use of the mail on furtherance of a scheme to defraud those who ordered goods as a result of such radio advertising. Petitioner was sentenced to a term of three years imprisonment.

Petitioner, with others, was first indicted on April 9, 1958, charged, in some thirty-two counts with using the mails in the execution of two separate schemes to defraud, conspiracy so to do, and a count involving use of a fictitious name. The acts alleged in the indictment were stated to have occurred between May and September, inclusive, of 1953. All counts of this indictment, with the exception of Count 19, were dismissed on motion of petitioner for failing to state a cause of action.

Count 1 was defective by reason of use of the disjunctive "or" in describing the scheme to defraud, pursuant to which the illegal use of the mail took place. Counts 2 to 18, and Counts 20 to 30, were defective in that no allegation was made of a scheme to defraud, said counts including by reference the "violations" contained in the first paragraph of Counts 1 and 19, respectively, which was the paragraph purporting to describe the scheme to defraud. Since a scheme to defraud, in and of itself, is not a violation of any federal statute, the word "violation", as used, had no meaning whatsoever.

On November 5, 1959, more than five years after the various offenses complained of, a second indictment in twenty counts was returned, charging petitioner with the same substantive acts as set forth in Counts 1 to 18, inclusive, and Counts 31 (fictitious name) and 32 (conspiracy) as had been charged in the first indictment. On motion of petitioner, all counts of this indictment, except Count 1, were dismissed for failure to state a cause of action.

Counts 2 to 18 failed to state an offense by again failing to state that the mailing in each count was pur-

suant to a scheme to defraud, through the inclusion only of the "violations" set forth in the first paragraph of Count 1 of the second indictment.

On November 19, 1958, a third indictment was found by the grand jury against the petitioners, consisting of thirty counts. Counts 1 to 18 realleged the matters set forth in similarly numbered counts in the first and second indictment, while Counts 19 to 30 realleged matters set forth in similarly numbered counts in the first indictment, but which had not been realleged in the second indictment. Counts 1 and 19 of the third indictment were dismissed by the trial court as repetitious of valid counts in the second and first indictments, respectively. No attempt was made to reallege the conspiracy or fictitious name counts.

Thereafter the petitioner was placed on trial as to Count 19 of the first indictment, Count 1 of the second indictment, and Counts 2 to 18, inclusive, and Counts 20 to 30, inclusive of the third indictment.

It should be noted that the scheme alleged in Counts 2 to 18, inclusive, of the third indictment included by reference allegations contained in Count 1 of the third indictment rather than by reference to Count 1 of the second indictment, which was a valid and subsisting charge.

At the conclusion of its evidence, the government withdrew Count 19 of the first indictment from the jury's consideration and moved the dismissal of Count 1 of the second indictment. The Government also moved to dismiss Counts 4, 5, 6, 8, 9, 13, 17, 21 and 23 of the third indictment. Of the remaining nineteen counts, the jury convicted petitioner on nine and ac-

quitted him on ten. All nine counts upon which he was convicted related to the alleged scheme to defraud radio stations. Petitioner was acquitted on all counts relating to the alleged scheme to defraud listeners.

Thus, petitioner was convicted only upon counts in the third indictment, which were reiterated for the third time, the last two of which being in indictments brought more than five years after the events complained of, and hence barred by the provisions of Title 18, United States Code, Section 3282, unless coming within the grace provisions of Title 18, United States Code, Section 3288. Petitioner at all appropriate times urged, both in the trial court and the court of appeals that the grace statute does not permit the return of more than one superseding indictment, and particularly where the earlier indictments failed to state a cause of action. It does not appear that this question has heretofore been decided by any federal court.

During the course of the trial, the Government presented evidence showing that the defendants, including petitioner, had, through a corporation which they owned and controlled, contracted to pay for large amounts of radio advertising time, but had only paid a small amount thereon prior to the collapse of the business. To show that this debt contraction was with specific intent *not* to pay, the prosecution introduced certain mailing stickers and a general ledger. Through the testimony of an accountant agent of the Federal Bureau of Investigation, it was stated that the mailing stickers showed the defendants had received 29,643 orders, which, when multiplied by average order amounts, indicated that the defendants had received gross receipts of $43,723.50, which, when compared to disbursements indicated by the

ledger of $35,587.10, resulted in a shortage of $8,136.49, not accounted for [Rep. Tr. 1198, 1199, 1209-1211, 1304-1305]. The testimony showed that the sum of $35,587.10, referred to above, was expended for the necessary expenses of the business, including the filling of orders received [Rep. Tr. 1201-1202, 1288, 1289.] The inference, of course, was that the defendants, including petitioner, had pocketed the difference, clearly showing the intent not to pay but to defraud the creditors.

No foundation was produced as required by the business record rule (Title 28, United States Code, Sec. 1732(a)) that these were records made in the usual course of business and that it was the usual course of business. It was not shown that these were records maintained by any of the defendants or under their direction or control up to the point in the trial that both the Government and this petitioner rested their respective cases. (This petitioner rested at the conclusion of the Government's case in chief.)

The foundation for the introduction of the address stickers and the ledger was the testimony of the postal inspector that he had seized these among other records from the possession of a third party [Rep. Tr. 995-997.] A former employee testified that he had conveyed a quantity of the defendants' records to the office where they were seized on a prior date [Rep. Tr. 995-997], but did not identify the questioned documents as being among those transferred. Over objection as to foundation, the Trial Court admitted these records, although not stating his reasons therefor. The Court of Appeals found these records admissible under the business record rule (Title 28, United States Code, Sec. 1732

(a)) and apparently also under the theory that a scheme to defraud participated in by several is so analogous to a charge of conspiracy that the rules of evidence making admissible the acts or declarations of co-conspirators are applicable to mail fraud cases, whether a conspiracy is charged or not. To find this principle applicable, the Court of Appeals must necessarily have considered testimony that another defendant (subsequently acquitted) had the duty of keeping records a sufficient foundation, although no evidence was produced that he kept or made *these* records, or, in the alternative, considered evidence received after petitioner rested wherein Reiss (subsequently acquitted) admitted keeping the ledger involved.

(h) Reasons for Granting Writ of Certiorari.

A Writ of Certiorari should be granted in this case for the following reasons:

The Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this court, namely, interpretation of Title 18, United States Code, Section 3288, as applied to successive superseding indictments brought after the applicable statute of limitations has run.

The Court of Appeals has decided a Federal question in a way conflicting with the applicable Federal Statutes. The decisions of this Court and the authoritative judicial decisions of the courts below in denying to the defendant in a criminal case a fair trial in contravention of his constitutional rights under the Fifth Amendment to the Constitution of the United States in that basic rulings relative to the admission of evidence have been specifically disregarded so as to call for this court's power of supervision.

Title 18, United States Code, Section 3288, herein above set forth in full, makes provision that when an indictment is found defective after the period prescribed by the statute of limitations has expired "a new indictment" may be returned not later than the end of the next succeeding regular term of court. The Court of Appeals affirmed the holding of the trial court that interpretation of the words "a new indictment does not limit the prosecution to a single new indictment but would permit the right of successive or plural indictments." It was conceded both in the District Court and in the Court of Appeals that this particular question had not heretofore been passed upon so far as any published decisions appear. It is the contention of petitioner that the section requires that interpretation which favors repose and that the grace granted by the statute should be strictly construed. This court, for example, gave strict construction of the predecessor statute in *United States v. Durkee Famous Foods*, 59 S. Ct. 456, 306 U. S. 68, where another phase of the statute was involved. As examples of holdings in lower courts favoring repose, see *United States v. Gross* (D. C. Nev. 1958), 159 Fed. Supp. 316; *United States v. Mendoza* (D. C. Cal. 1954), 122 Fed. Supp. 367; *United States v. Udell* (D. C. Del. 1952), 109 Fed. Supp. 96; *United States v. Satz* (D. C. N. Y. 1952), 109 Fed. Supp. 94; *United States v. Laut* (D. C. N. Y. 1955), 17 F. R. D. 31).

While the Opinion of the Circuit Court seeks to avoid the implications which would arise from sanctioning more than one indictment after the statute of limitations has run by invoking that part of the statute limiting the time within which the new indictment may be re-

turned to the end of the next succeeding term of court, this would not necessarily be the logical conclusion which would be reached. Having opened the door to the return of each successive indictment, can it then be said that the return of each successive indictment does not create a period extending in each instance to the end of the next succeeding term of Court for the return of additional superseding indictments? The Court of Appeals attempts to obviate this difficulty by stating that an intermediate indictment no longer material may be disregarded. To apply this argument to the instant case overlooks the fact that this petitioner was put on trial as to at least one count of the intermediate indictment. However, it is clear that the Court of Appeals is forced to the position that the intermediate indictment is in effect a nullity for the reason that if the third indictment is a successor to an indictment which was itself barred by the statute of limitations, except for the grace of the saving statute, then the final indictment not being a successor to an indictment timely brought (but a successor to a subsequent indictment) would clearly fall within the inhibition of Title 18, United States Code, Section 3282 as having been brought more than five years after the alleged offense. If the critical counts of the intervening indictment are to be considered a nullity, then the same reasoning would apply to the first indictment, and it, too, considered a nullity. In such situation the third indictment would clearly be barred, as the grace statute would have no application.

It is respectfully urged that clarification of the proper interpretation to be given Title 18, United States Code, Section 3288, is urgently needed for the administration of justice and in order to guide the lower courts.

The question of the sufficiency of the evidence to warrant conviction was a close one. As stated by the Court of Appeals, after examination of the entire record, "On the other hand the jury could have concluded that Mende and his associates were just bad businessmen and indifferent about their creditors. But the jury did not so conclude. Of course, the key question is intent, ... it must be inferred."

On this key question of intent the prosecution offered the testimony of the accountant agent, that by his examination of the disputed ledger and disputed address stickers, he computed that the defendants had received $8,136.49 more than was accounted for [Rep. Tr. 1198-1199, 1209-1211, 1304-1305]. The postal inspector also volunteered that upon examination of the books and records "we found that there is money unaccounted for" [Rep. Tr. 1147]. The inference from this testimony is to clearly support the charge in the indictment that the defendants were seeking and obtaining credit without intent to pay therefor. It cannot be said that the jury was not influenced by this testimony in an otherwise close case. Therefore, the question of the admission of these records was an important one, and if erroneously admitted would warrant setting the conviction aside.

The foundation testimony was brief. A former employee testified that in August or September the files and records of Per-Men Advertising (defendants' corporation) were moved to offices occupied by a Mr. Gwirtz who ran the Irwin Rose Agency there [Rep. Tr. 995-996]. Shown the general ledger, he stated that "it looks like it might be" one of the records of Per-Men [Rep. Tr. 1000]. The general office secretary stated

that she could not identify the ledger, although it was shown to her [Rep. Tr. 94-95]. A postal inspector testified that the address stickers and ledger were among records which he took into his possession from Gwirtz [Rep. Tr. 1021-1022]. Upon this testimony, and over appropriate objections that no proper foundation was laid, the questioned documents were received in evidence.

In reviewing the evidence, the Court of Appeals brushed aside the mailing stickers as "of no consequence." As to the ledger, while admitting the gravity of the question, the Court states that "it comes within the business record rule of 28 United States Code, 1732 (a)." It adds that "there was sufficient evidence of a common enterprise of the group of defendants to lay the foundation for the admission of the ledger", and cites *Robinson v. United States* (C. A. 9), 33 F. 2d 238, as more appropriate than the later case of *Ilseng v. United States* (C. A. 9), 120 F. 2d 823, cert. den. 62 S. Ct. 126, 314 U. S. 665, upon which petitioner relied, and still relies.

Clearly, at the time the documents were admitted and the conclusions drawn from their contents, no showing either directly or by inference had been produced that the entries were made in the usual course of business or that it was the usual course of business to keep such records. Nor was such lack thereafter supplied by the prosecution or by other defendants prior to the time the petitioner rested his case and elected to stand upon evidence produced by the Government in its case in chief. We can find no authority to indicate that such records themselves can be used to determine whether they were kept in the usual course of business, and

hence self-executing on the question of admissibility. Such holding, as is inherent in the Court of Appeal's opinion, is violative of petitioner's rights to due process of law, and to a fair trial.

In rejecting its own holding in the *Ilseng* case, *supra*, that in the case of multiple defendants in a mail fraud case, even though books and records may be admissible as to one defendant corporate officer on the basis of representations or admissions by him that they were the corporate books, nevertheless as to another corporate officer defendant and a corporate employee defendant, such books must actually be connected with the latter in some sufficient manner or through a finding that they were co-conspirators (a count charging conspiracy was present in the *Ilseng* case), the Court of Appeals abandons evidentiary principles of long standing.

There was evidence that a co-defendant kept the books and records of the enterprise, but not that these were among such books and records.

The Court of Appeals, in attempting to apply the principle it had earlier announced in *Robinson v. United States*, *supra*, that where several participate in a scheme to defraud, it partakes of the nature of a conspiracy and the evidentiary rules pertaining to conspiracy are applicable, appears to be in direct conflict with such recent statements of the Supreme Court as that made in *Grunewald v. United States*, 77 S. Ct. 963, 974; 353 U. S. 391, 404, that it will "view with disfavor attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions."

The Court of Appeals, in holding the ledger admissible against petitioner must necessarily have considered

that the evidence was sufficient for their introduction against a co-defendant (presumptively Reiss, the accountant) and under the rule in conspiracy cases (applicable, according to the Court of Appeals, in substantive mail fraud cases) that the acts or admissions of a co-conspirator in furtherance of the conspiracy are admissible against all, whether or not the others were present, ratified or authorized the act or admission.

But in order to hold the ledger admissible as to Reiss, the Court of Appeals must necessarily have taken into account testimony offered by Reiss in his own behalf subsequent to both the prosecution and this petitioner having closed petitioner's case. Reiss, in his own defense, admitted that he kept the ledger in question and defended it as accurate. But until such testimony was received, there was not sufficient foundation laid for its admission as to Reiss. Such evidence is clearly not admissible as to this petitioner, who was no longer a participant in the reception of evidence, and would be violative of his rights under *Amendment V* of the *Constitution of the United States* as denying him due process of law.

Moreover, Reiss was acquitted on all counts, so that if the rules of conspiracy were to apply, he cannot, in considering the evidence, be considered as a co-conspirator whose acts outside their presence are binding on the others.

Absent the conspiracy theory, it not having been shown that the disputed records were kept in the usual course of business and that it was the usual course of business to keep such records, then they would have to be connected with petitioner in some sufficient manner by way of entries made by him therein, or by statements

or admissions showing his connection. No such evidence was produced.

It is suggested that clarification of the questions raised herein is needed for the proper administration of justice and to avoid multiplicity of litigation.

Wherefore, it is respectfully submitted that this petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, in the above entitled matter, should be granted.

Respectfully submitted,

GEORGE M. BRYANT,
Attorney for Petitioner.

WALTER M. CAMPBELL,
Of Counsel.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Milton Mende, Appellant, v. United States of America, Appellee. No. 16,687.

Sept. 26, 1960.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Chambers, Jertberg and Koelsch, Circuit Judges.

Chambers, Circuit Judge:

This is a mail fraud case. The first point on appeal concerns, because of statutes of limitations, the effect of bringing in a new indictment which dropped the word "either" and changed one "or" to "and."

Mende was one of the principals in an enterprise of soliciting mail orders for towels and perfume by means of radio advertising. Financially the business was a flop. Radio stations generally didn't get paid for their broadcast time. Essentially the basis of three successive indictments was that Mende and his associates bought the radio time from widely scattered stations without intending to pay for it.

The mailing of a letter to each of eighteen different radio stations in connection with the buying of the time as part of the overall business was the core of eighteen separate counts. Convictions were had as to counts 2, 3, 7, 10, 11, 12, 14, 15 and 18. A three-year sentence concurrent as to all counts was imposed. (We

need not concern ourselves with additional counts which charged a mail fraud in connection with the failure to deliver orders to customers. Some of these counts were dismissed for failure of proof and on others the jury said: "Not guilty.")

The first indictment was returned April 9, 1958. On the counts here pertinent, the earliest mailing was May 5, 1953, and the last on August 14, 1953. Thus, the original indictment was within the five-year period prescribed by 18 U. S. C. §3282. The first indictment was, on defendant's motion, as to all pertinent counts dismissed on July 14, 1958.

A second indictment was returned on November 5, 1958. The mailings described in the counts were the same, but one facet of the original scheme was eliminated. There was no new matter in the second indictment. And the second indictment was timely because it was within the next term and the grace period of 18 U. S. C. §3288, which reads as follows:

"Whenever an indictment is dismissed for any error, defect or irregularity with respect to the grand jury, or is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned no later than the end of the next succeeding regular term of such court, following the term at which such indictment was found defective or insufficient, during which a grand jury shall be in session which new indictment shall not be barred by any statute of limitations."

On November 19, 1958, the second indictment was dismissed on defendant's motion, and on the same day

we have a third indictment returned, identical as to the critical counts except that paragraph 4 was different in the following respects:

In the second indictment (as in the first)	In the third indictment
That those radio stations, managers, and representatives thereof, which had broadcast the advertising originally submitted by the defendants and which indicated that the broadcasting requested by the defendants would be terminated were further requested by the defendants to either continue the broadcasts or to cancel the broadcasts of specific advertising and replace it with other advertising submitted by the defendants;	That those radio stations, managers, and representatives thereof, which had broadcast the advertising originally submitted by the defendants and which indicated that the broadcasting requested by the defendants would be terminated were further requested by the defendants to continue the broadcasts and to cancel the broadcasts of specific advertising and replace it with other advertising as submitted by the defendants;

Mende's counsel, in an able brief, argues "a new indictment" in the grace statute means one indictment and one only. The trial court, in effect, ruled that any number of new indictments on the same subject matter and same defendants could be brought within the "next succeeding term" following the term in which the original indictment was dismissed for some deficiency.

Neither side finding square authority on the question, appellant marshals the cases holding that criminal statutes are construed strictly in favor of defendants. Also, he points to the possibility of repeated in-

dictments harassing defendants after the five year period has expired.

But it is not every proposition in criminal law that is construed strictly in favor of defendant. As a matter of simple English it is very plausible to argue that a man once indicted who has his indictment dismissed at the outset for insufficiency is subject to "double jeopardy" if he is reindicted on the same set of facts. While reindictments, particularly in a number of states, are limited by statutes, yet the law so grew up that something more than mere reindictment was required to constitute jeopardy.

We are not impressed with arguments that successive indictments during the extra term might be used to harass. Experience has shown that such an evil certainly has not been commonplace during the basic statutory period for indictment. And, we assume, if a prosecutor so lost sight of his sworn duty as to indulge in such a practice either during the basic statute or the period of grace of §3288 a court would properly stop abuse.

As we construe §3288, "a new indictment" within the next term correlates such indictment under scrutiny with an indictment or indictments brought within the normal season of five years. And an intermediate indictment no longer material may be disregarded. That is to say, we see no reason to apprehend a construction that statutory grace can be piled on statutory grace from term to term to the end of time. Surely one such peri-

od is all that is contemplated. We think the underlying concept of §3288 is that if the defendant was indicted within time, then approximately the same facts may be used for the basis of any new indictment within the next term, if the earlier indictment runs into legal pitfalls. We believe the draftsman would agree with our construction as to what he intended. And we think he did say it, even though appellant's argument is by no means frivolous.

Defendant asserts that there was insufficient evidence to take the case to the jury. We have gone over the entire record and conclude there is. On the other hand, the jury could have concluded that Mende and his associates were just bad businessmen and indifferent about their credtiors. But the jury did not so conclude. Of course, the key question is intent. Though oft repeated, we must again say that intent seldom, except by admission, can be proved by direct evidence. From murder and treason down to petty mail fraud, it must be inferred.

Trial counsel for Mende was denied a continuance which he requested because of a facial affliction from which counsel was suffering. The transcript indicates that this trouble did not affect the quality of counsel's mental activity. And the same counsel secured the acquittal of a co-defendant and of Mende on many counts, including all the alleged frauds on buyers of merchandise. This sort of a specification is difficult to review.

but we find nothing in the record to indicate an abuse of discretion.

Finally, appellant specifies as error the admission of certain exhibits such as mailing stickers, a general ledger and invoices and billing statements of radio stations. The mailing stickers are of no consequence and the invoices and billing statements are of little importance. The improper admission of the ledger would be serious. However, our examination of the transcript indicates that it was sufficiently identified. We think it comes within the business record rule of 28 U. S. C. 1732(a). Appellant thinks it important that there was no substantive count in the indictment of conspiracy. We find that there was sufficient evidence of a common enterprise of the group of defendants to lay the foundation for the admission of the ledger. On the facts here, the use of Robinson v. United States, 9 Cir. 33 F. 2d 238, is more appropriate than Ilseng v. United States, 9 Cir. 120 F. 2d 823, on which appellant relies.

Judgment affirmed.

(Endorsed) Opinion Filed Sept. 26, 1960.

Frank H. Schmid, Clerk.

Order on Motion for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Milton Mende, Appellant, v. United States of America, Appellee. No. 16,687.

On Petition for Rehearing.

Before: Chambers, Jertberg and Koelsch, Circuit Judges.

Per Curiam:

The first paragraph of the opinion filed herein on September 26, 1960, is amended to read as follows:

This is a mail fraud case. The first point on appeal concerns, because of statutes of limitations, the effect of bringing in a new indictment which dropped the word "either" and changed one "or" to "and," plus the substitution of the word "allegations" for the word "violations."

The petition for rehearing is denied.

(Endorsed): Filed October 25, 1960. Frank H. Schmid, Clerk.

Judgment of Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

Milton Mende, Appellant, v. United States of America, Appellee. No. 16687.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed): Judgment.

Filed and entered: September 26, 1960. Frank H. Schmid, Clerk.

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JAMES R. BROWNING, C

No. 530

In the Supreme Court of the United States

OCTOBER TERM, 1960

MILTON MENDE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	2
Argument	4
Conclusion	10

CITATIONS

Cases:	
Ilseng v. *United States*, 120 F. 2d 823, certiorari denied, 314 U.S. 665	9
United States v. *Strewl*, 99 F. 2d 474, certiorari denied, 306 U.S. 638	6
Statutes:	
18 U.S.C. 1341	3
18 U.S.C. 3288	2, 5
28 U.S.C. 1732	2, 8, 9
Miscellaneous:	
H. Rep. No. 1620, 76th, 3d Sess	5
S. Rep. No. 1802, 76th Cong., 3d Sess	5

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–6) is reported at 282 F. 2d 881.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1960 (Pet. App. 8). A petition for rehearing was denied on October 25, 1960 (Pet. App. 7). The petition for a writ of certiorari was filed on November 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 3288, which permits reindictment during the subsequent term of court following the dismissal of an indictment that is found defective

after the statute of limitations has run, permits a second reindictment during that period.

2. Whether the admission of certain evidence was proper.

STATUTES INVOLVED

18 U.S.C. 3288 provides:

> Whenever an indictment is dismissed for any error, defect or irregularity with respect to the grand jury, or is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned not later than the end of the next succeeding regular term of such court, following the term at which such indictment was found defective or insufficient, during which a grand jury shall be in session which new indictment shall not be barred by any statute of limitations.

28 U.S.C. 1732 provides in pertinent part:

> (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

* * * * *

STATEMENT

Following a trial by jury in the District Court for the Southern District of California, petitioner and

Harold Cowan were convicted on nine counts of an indictment which charged a use of the mails in furtherance of a scheme to defraud radio stations by obtaining credit for radio advertising without intention to pay therefor, in violation of 18 U.S.C. 1341 (Vol. I, 52–75, 86–87).[1] On April 27, 1959, petitioner was sentenced to serve a term of imprisonment of three years on each of the nine counts, the sentences to run concurrently with each other (Vol. I, 95–96). On appeal, the court of appeals unanimously affirmed the conviction (Pet. App. 8). Co-defendant Cowan did not appeal his conviction.

The evidence showed that, in April 1953, petitioner and another person formed the Per-Men Advertising Company with a capitalization of about $2,000; that from April to September 1953, Per-Men engaged in a retail mail order business in a variety of products; that petitioner, as vice president of Per-Men, wrote many letters in the spring and summer of 1953 to various radio stations throughout the United States in an effort to obtain on credit radio advertising for Per-Men's products (*e.g.*, Tr. 221–224, 344–345, 453–454, 462–463, 509, 553–554, 592–598); that over 300 radio stations extended credit to Per-Men and advertised Per-Men's products in 1953 (Tr. 1204–1205; see Tr. 1056); that, with but one exception, the radio stations

[1] The record consists of 16 volumes. Volumes II through XV, which are consecutively paginated, constitute the transcript of proceedings in the district court and will be referred to as "Tr." Volumes I and XVI, each of which is separately paginated, constitute the indictments and proceedings in the court of appeals, respectively, and will be referred to by volume number.

were never paid for their advertising time (*e.g.*, Tr. 216–217, 346, 464, 511, 558–559, 601, 664–665, 717; see Tr. 1204–1205); that Per Men's radio advertising costs were over three times greater than the total of Per-Men's gross sales in 1953 (Tr. 1202–1208); that petitioner sought and obtained different radio stations to advertise Per-Men's products at a time when he knew that the current advertising expenses substantially exceeded incoming business (*e.g.*, Tr. 332–333, 357–358; see Tr. 971–972, 1200–1210); and that the petitioner and Cowan never intended to have Per-Men pay for the advertising expenses (see Tr. 817–820, 910–911, 1057).[2]

ARGUMENT

1. The mailings charged in the counts presently involved in this case cover a period from May to August, 1953. An indictment charging such offenses was returned on April 9, 1958, and, as to the counts similar, to these here involved, was dismissed as defective on July 14, 1958. A new indictment was returned on November 5, 1958, and as to the pertinent counts was similarly dismissed on November 19, 1958 (Vol. I, 29–48). On the same day, petitioner and his co-defendants were reindicted for the same matters

[2] In March 1953, prior to the formation of Per-Men, petitioner told one of his suppliers that the proposed business (Per-Men) would be "quite big" because "they were going to go on as many stations as they could" (Tr. 908, 911). When asked whether he would be able to pay for the radio advertising in the event that sales were insufficient, petitioner said, "We are going to go on as many [stations] as we can P.I. [per inquiry], and then we will buy time from then on, and if we don't make a go of it, we just won't pay. We can't lose" (Tr. 911).

which were included in the dismissed counts of the first and second indictments (Vol. I, 52–75). The difference between the third indictment and the second is set forth in tabular form in the opinion below (Pet. App. 3). It consisted of changing an allegation that defendants had requested broadcasters "either" to continue the broadcasts "or" to cancel and replace the material, to an allegation that they requested the stations to continue "and" replace.

Petitioner contends (Pet. 11–12) that 18 U.S.C. 3288, *supra*, p. 2, should be strictly construed to permit but one reindictment after the statute of limitations has run on the offenses charged in the original indictment. He argues that, otherwise, "each successive indictment" would extend "in each instance to the end of the next succeeding term of Court for the return of additional superseding indictments" (Pet. 12). This case does not, however, present any problem of extension beyond the period fixed by 18 U.S.C. 3288. The second reindictment (like the first reindictment) was returned in the term of court succeeding that in which the original indictment was dismissed. Both the language of 18 U.S.C. 3288 and its legislative history support the view that this is proper.

It was the intent of Congress "to limit the time to the next definite term (which would be the regular term)" for "*any new indictment* found under the terms of the law." S. Rep. No. 1802, 76th Cong., 3d Sess., at p. 2 (emphasis added); see also H. Rep. No. 1620, 76th Cong., 3d Sess., at pp. 1–2. Since the first reindictment was dismissed, the second reindictment is, in fact and in law, the "new indictment" allowed

by the statute—and it was returned "not later than the end of the next succeeding regular term of such court" following the dismissal of the original indictment. The first reindictment may be disregarded as no longer material. Thus, even under a "strict construction" of the statute, the second reindictment falls within the literal terms of the statute, since it is a "new indictment" returned in the proper term of court following the dismissal of the original indictment. This interpretation of the statute is in complete accord with its underlying purpose—"to prevent the escape of those who had been seasonably indicted, but whose indictment was bad because of some corrigible mistake" (*United States* v. *Strewl*, 99 F. 2d 474, 477 (C.A. 2), certiorari denied, 306 U.S. 638).

2. Contrary to petitioner's contention (Pet. 13–16), the various rulings on the evidence were proper.

a. *Government Exhibit 24, the "address stickers".* Petitioner challenges (Pet. 13, 14) the admissibility of Government Exhibit 24, a quantity of Per-Men's "address stickers" for the addressing and mailing of products to individual purchasers, on the ground that there was "no proper foundation" established for the receipt of the exhibit into evidence. A sufficient foundation, however, was laid by the Government. Mrs. Vera Stanton, a former employee of Per-Men (Tr. 24), testified that mail orders for Per-Men's products were generally received by Per-Men from the radio stations which forwarded the mail from individual purchasers; that these orders, as well as orders received directly from individuals, were recorded on the "address stickers"; that each "address

sticker" constituted one order; that she and others did the actual typing of the stickers; that one copy of each sticker was placed on each package which Per-Men mailed to individual purchasers, while two additional copies of each sticker were retained by Per-Men for record purposes; that Government Exhibit 24 constituted mailing or "address stickers"; and that Per-Men used mailing or "address stickers" in its business (Tr. 96–103, 111–112, 115–117). Mr. Allan Moline, a former employee of Per-Men (Tr. 961), testified that Per-Men, in August or September 1953, moved its business to the offices of the Irwin Rose Agency, which was "headed" by a Mr. Gwirtz, and that he, Moline, moved a "big filing cabinet, and the books, and things that were property of Per-Men" to the Irwin Rose Agency (Tr. 995–1000). A postal inspector identified Government Exhibit 24 and testified that it constituted "a portion of the various documents picked up from Mr. Gwirtz [pursuant to a postal seizure] as being the effects of the Per-Men Advertising Agency, Inc." (Tr. 1021, 1036).

Government Exhibit 24, which indicated that over 29,000 orders were received by Per-Men for which "address stickers" were typed (Tr. 1198–1199), was relevant to the issue of petitioner's intent to defraud the radio stations. The volume of Per-Men's business in 1953, reflected by the "address stickers" to be about $40,000, was important when compared with the costs of radio advertising which, at the same time, amounted to more than $128,000 (Tr. 1204–1205, 1209–1210). This evidence showed that petitioner continually sought to obtain additional radio advertising

at a time when he knew that Per-Men's volume of business was substantially less than the cost of such advertising. See the Statement, *supra*, pp. 3–4.

b. *Government Exhibit 27, the General Ledger of Per-Men.* Petitioner contends that the trial court erred in admitting the general ledger of Per-Men into evidence. He argues (Pet. 14–16) that the exhibit was inadmissible under 28 U.S.C. 1732, the "Business Records Act", because there was no showing that "the entries were made in the usual course of business or that it was the usual course of business to keep such records". He also argues that the exhibit was inadmissible on the "conspiracy theory" (*i.e.*, acts and declarations made by a co-conspirator in furtherance of a conspiracy may be admitted against all conspirators) because until co-defendant Reiss testified with respect to his entries in the ledger "there was not sufficient foundation laid for its admission as to Reiss" (Pet. 16). The contentions are without merit.

When Government Exhibit 27 was admitted into evidence, the record clearly indicated that that exhibit was maintained by Per-Men in the ordinary course of its business, and that co-defendant Reiss (who was acquitted by the jury) maintained the general ledger in the usual course of his employment, as a bookkeeper and an officer, with Per-Men. As bookkeeper, Reiss came "in every day and marked everything in the book [general ledger]" (Tr. 971; see Tr. 28, 908, 965, 970, 972). Petitioner often conferred with Reiss "about bookkeeping matters" and, at least on one occasion, examined the books with Reiss (Tr. 27, 972).

The general ledger, which, together with other records belonging to Per-Men, was moved by Moline to the Irwin Rose Agency (Tr. 995–1000, 1047–1050), was seized by a postal inspector at the Irwin Rose Agency and kept in the possession of the Government (Tr. 1048–1049). The general ledger, therefore, was properly received into evidence under 28 U.S.C. 1732 as a business record of Per-Men maintained in the ordinary course of business.

The books were admissible against petitioner, irrespective of whether Reiss was a co-conspirator or merely an employee. Petitioner was the dominant and controlling figure in the corporation and was shown to have taken an active interest in the books. The case of *Ilseng* v. *United States*, 120 F. 2d 823 (C.A. 9), certiorari denied, 314 U.S. 665, relied upon by petitioner (Pet. 14–16), supports, rather than negates, the admissibility of the books against petitioner. In *Ilseng*, the court ruled that books of the corporation were admissible against its dominant figure, Ilseng Sr. It was only as to other defendants that the court noted that the books would not be admissible unless there was a showing that those other defendants were connected with the books or were co-conspirators with Ilseng Sr. In the instant case, petitioner was sufficiently connected with Per-Men's books to permit their admissibility as to him, as was the case with Ilseng Sr. Indeed, the instant case is much stronger than *Ilseng*, for nowhere does it appear in that decision that Ilseng Sr. examined or otherwise dealt with the corporate books, as petitioner did here.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM RICHARD WILKEY,
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RICHARD W. SCHMUDE,
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DECEMBER 1960.

U. S. GOVERNMENT PRINTING OFFICE 1960

TABLE OF AUTHORITIES CITED

	PAGE
SENATE REPORT	
Senate Report No. 1082, 76th Congress, 3d Sess., p. 2	5
STATUTES	
United States Code, Title 18, Sec. 1341	3
United States Code, Title 18, Sec. 3282	3, 4
United States Code, Title 18, Sec. 3288	2, 5
United States Code, Title 28, Sec. 1254(1)	2

IN THE

Supreme Court of the United States

October Term, 1960
No. 530

MILTON MENDE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing After Denial of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the petitioner, Milton Mende, and respectfully petitions this Court to reconsider its order denying his petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit, and shows:

Opinion Below.

The opinion of the Court of Appeals is reported at 282 F. 2d 881. A copy of said opinion is printed in the Appendix A annexed to this petition.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 26, 1960. Petition for rehearing was denied on October 25, 1960. Petition for writ of certiorari was filed on November 15, 1960, and was denied by the Supreme Court of the United States on January 9, 1961. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented.

Whether 18 U. S. C. 3288, which permits a reindictment during the subsequent term of Court following the dismissal of an indictment that is found defective after the Statute of Limitations has run, permits a second reindictment in the subsequent term.

Statutes Involved.

Title 18 U. S. C. 3288 provides:

> "Whenever an indictment is dismissed for any error, defect or irregularity with respect to the grand jury, or is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned no later than the end of the next succeeding regular term of such court, following the term at which such indictment was found defective or insufficient, during which a grand jury shall be in session which new indictment shall not be barred by any statute of limitations." (Emphasis supplied.)

Title 18, United States Code, Section 3282 provides:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

Statement.

The petitioner was heretofore convicted on nine counts of using the mails in furtherance of a scheme to obtain money or property by means of false or fraudulent representations in violation of Title 18 United States Code, Section 1341. These counts were included in the third indictment returned on November 19, 1958, in this matter and involved acts alleged to have occurred between May 5, 1953, and August 14, 1953, inclusive.

Petitioner was first indicted with regard to mail fraud on April 9, 1958. On July 15, 1958, the first indictment was dismissed for failure to state a cause of action as to the counts upon which conviction was had. A second indictment charging the same acts charged in the dismissed counts in the first indictment was returned on November 5, 1958, during the next succeeding term of court. This second indictment, hereinafter referred to as the "first reindictment" was dismissed on November 19, 1958, for failure to set forth a cause of action. On the same day, November 19, 1958, a third indictment, hereinafter referred to as the "second reindict

ment" was returned by the grand jury recharging the matters set forth in the dismissed counts of the first indictment and the dismissed counts of the first reindictment.

More than five years after the acts and the commencement of the government investigation, the petitioner was put to trial on the valid counts set forth in all three indictments but was convicted only upon those counts set forth in the third indictment which counts were those which had been dismissed for failure to state a cause of action in the original indictment filed April 9, 1958, and the first reindictment filed November 5, 1958.

The statute of limitations, 18 United States Code, 3282, would have barred the various counts upon which petitioner stands convicted commencing with the earliest count on May 5, 1953, and on the latest count on August 14, 1953.

Argument.

Counsel for petitioner feels remiss in not having called to the attention of this court the fact that to permit the decision of the Court of Appeals to stand will be to punish a defendant for the diligence of his counsel in calling defective indictments to the attention of the Trial Court. Conversely, it will reward dilatory tactics.

Had petitioner's counsel delayed his attack on the first reindictment until the time of trial or raised it for the first time on appeal, then a full term of court would have intervened between the time the original indictment was dismissed and the first reindictment was found defective. Under the decision of the Court

of Appeals, and pursuant to the argument made by the Solicitor General in his brief in opposition to certiorari (Opposition Brief, 5-6), it would appear that 18 United States Code, 3288, *supra*, would not extend the period of grace to a second reindictment. If this be true, then petitioner has been penalized for diligently raising the fact that the first reindictment failed to state a cause of action by use of the word "violations" in the critical counts. He could well have sat back and gambled upon the outcome of the trial before disclosing his "ace in the hole," which would effectively set aside his conviction and, through lapse of time, bar his subsequent reindictment and retrial.

On the other hand, it could then be plausibly argued that the first reindictment, having been seasonably brought, extended the grace period until the end of the court term following that in which it too had been found defective. If this be correct, then the first reindictment is not "no longer material" and may be disregarded, as contended by the Court of Appeals. Such holding would, of course, emasculate the statute of limitations, provided only that the first of the series of indictments be brought within the initial period.

Actually, a reading of 18 U. S. C. 3288 obviates either dilemma. The word "a" means one, a single unit. Nor does such interpretation do violence to the intent of Congress to limit the time for "any new indictment" (S. Rep. No. 1082, 76th Cong., 3d Sess., at p. 2), for the word "any" does not generically mean more than one. It is a word which contrasts with "none".

Finally, we believe attention should be directed to the fact that the question of limitations in the instant case

is not of Petitioner's making. Delay can work at least as great hardships on the defense as on the prosecution. The investigation in the instant case was commenced prior to the dates on which some of the offenses are alleged to have occurred. The Postal Inspector interviewed certain of the defendants on July 15, 1953 [Tr. 1051] and again on July 21, 1953 [Tr. 1059]. He took the records into custody on October 5, 1953 [Tr. 1021-1024]. The principal government witness on the question of intent, Stern, was interviewed and his records obtained in October, 1953 [Tr. 921, 927]. Yet the first indictment was not returned until April 9, 1958, less than a month before the earliest count and less than five months before the latest counts would have been barred by the lapse of five years.

The purpose of the statutes of limitation is to permit the government a reasonable period of time to discover the crime, and to bring its perpetrators to justice. Conversely, they are intended to protect defendants against stale claims, against which, through lapse of time, they are unable to adequately defend themselves. Finally, they are intended to bring a surcease of ancient cases from the courts' dockets.

Under the facts of the instant case, the prolonged delay from the ascertainment of the "facts" to the return of the first indictment, appears to be an abuse of process. Impinged upon this, is an interpretation of law which then permits the return of a series of three indictments, the latter two of which are brought beyond the five year period.

Conclusion.

It is earnestly urged that the situation presented is one which should merit the interference by this Honorable Court. It is therefore prayed that the Court will reconsider, and will grant certiorari as originally sought.

Respectfully submitted,

GEORGE M. BRYANT,
Attorney for Petitioner.

WALTER M. CAMPBELL,
Of Counsel.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Milton Mende, Appellant, v. United States of America, Appellee. No. 16,687. September 26, 1960. As Amended on Denial of Rehearing, Oct. 25, 1960.

Before Chambers, Jertberg and Koelsch, Circuit Judges.

Chambers, Circuit Judge.

This is a mail fraud case. The first point on appeal concerns, because of statutes of limitations, the effect of bringing in a new indictment which dropped the word "either" and changed one "or" to "and," plus the substitution of the word "allegations" for the word "violations."

Mende was one of the principals in an enterprise of soliciting mail orders for towels and perfume by means of radio advertising. Financially the business was a flop. Radio stations generally didn't get paid for their broadcast time. Essentially the basis of three successive indictments was that Mende and his associates bought the radio time from widely scattered stations without intending to pay for it.

The mailing of a letter to each of eighteen different radio stations in connection with the buying of the time as part of the overall business was the core of eighteen separate counts. Convictions were had as to counts 2, 3, 7, 10, 11, 12, 14, 15 and 18. A three year sentence concurrent as to all counts was imposed. (We need not concern ourselves with additional counts which

charged a mail fraud in connection with the failure to deliver orders to customers. Some of these counts were dismissed for failure of proof and on others the jury said: "Not guilty.")

The first indictment was returned April 9, 1958. On the counts here pertinent, the earliest mailing was on May 5, 1953, and the last on August 14, 1953. Thus, the original indictment was within the five-year period prescribed by 18 U. S. C. §3282. The first indictment was, on defendant's motion, as to all pertinent counts dismissed on July 14, 1958.

A second indictment was returned on November 5, 1958. The mailings described in the counts were the same, but one facet of the original scheme was eliminated. There was no new matter in the second indictment. And the second indictment was timely because it was within the next term and the grace period of 18 U. S. C. 3288, which reads as follews:

> "Whenever an indictment is dismissed for any error, defect or irregularity with respect to the grand jury, or is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned not later than the end of the next succeeding regular term of such court, following the term at which such indictment was found defective or insufficient during which a grand jury shall be in session which new indictment shall not be barred by any statute of limitations."

On November 19, 1958, the second indictment was dismissed on defendant's motion, and on the same day

we have a third indictment returned, identical as to the critical counts except that paragraph 4 was different in the following respects:

In the second indictment (as in the first)

> That those radio stations, managers, and representatives thereof, which had broadcast the advertising originally submitted by the defendants and which indicated that the broadcasting requested by the defendants would be terminated were further requested by the defendants to either continue the broadcasts or to cancel the broadcasts of specific advertising and replace it with other advertising submitted by the defendants;

In the third indictment

> That those radio stations, managers, and representatives thereof, which had broadcast the advertising originally submitted by the defendants, and which indicated that the broadcasting requested by the defendants would be terminated were further requested by the defendants to continue the broadcasts and to cancel the broadcasts of specific advertising and replace it with other advertising as submitted by the defendants;

Mende's counsel, in an able brief, argues "a new indictment" in the grace statute means one indictment and one only. The trial court, in effect, ruled that any number of new indictments on the same subject matter and same defendants could be brought within the "next succeeding term" following the term in which the original indictment was dismissed for some deficiency.

Neither side finding square authority on the question, appellant marshals the cases holding that criminal statutes are construed strictly in favor of defendants. Also, he points to the possibility of repeated indictments harassing defendants after the five-year period has expired.

But it is not every proposition in criminal law that is construed strictly in favor of defendant. As a matter of simple English it is very plausible to argue that a man once indicted who has his indictment dismissed at the outset for insufficiency is subject to "double jeopardy" if he is reindicted on the same set of facts. While reindictments, particularly in a number of states, are limited by statutes, yet the law so grew up that something more than mere reindictment was required to constitute jeopardy.

We are not impressed with arguments that successive indictments during the extra term might be used to harass. Experience has shown that such an evil certainly has not been commonplace during the basic statutory period for indictment. And, we assume, if a prosecutor so lost sight of his sworn duty as to indulge in such a practice either during the period of the basic statute or the period of grace of §3288 a court would properly stop abuse.

As we construe §3288 "a new indictment" within the next term correlates such indictment under scrutiny with an indictment or indictments brought within the normal season of five years. And an intermediate indictment no longer material may be disregarded. That is to say we see no reason to apprehend a construction that statutory grace can be piled on statutory grace from term to term to the end of time. Surely one such

period is all that is contemplated. We think the underlying concept of §3288 is that if the defendant was indicted within time, then approximately the same facts may be used for the basis of any new indictment within the next term, if the earlier indictment runs into legal pitfalls. We believe the draftsman would agree with our construction as to what he intended. And we think he did say it, even though appellant's arguments is by no means frivolous.

Defendant asserts that there was insufficient evidence to take the case to the jury. We have gone over the entire record and conclude there is. On the other hand, the jury could have concluded that Mende and his associates were just bad businessmen and indifferent about their creditors. But the jury did not so conclude. Of course, the key question is intent. Though oft repeated, we must again say that intent seldom, except by admission, can be proved by direct evidence. From murder and treason down to petty mail fraud, it must be inferred.

Trial counsel for Mende was denied a continuance which he requested because of a facial affliction from which counsel was suffering. The transcript indicates that this trouble did not affect the quality of counsel's mental activity. And the same counsel secured the acquittal of a co-defendant and of Mende on many counts, including all the alleged frauds on buyers of merchandise. This sort of specification is difficult to review, but we find nothing in the record to indicate an abuse of discretion.

Finally, appellant specifies as error the admission of certain exhibits such as mailing stickers, a general ledg

er and invoices and billing statements of radio stations. The mailing stickers are of no consequence and the invoices and billing statements are of little importance. The improper admission of the ledger would be serious. However, our examination of the transcript indicates that it was sufficiently identified. We think it comes within the business record rule of 28 U. S. C. §1732(a). Appellant thinks it important that there was no substantive count in the indictment of conspiracy. We find that there was sufficient evidence of a common enterprise of the group of defendants to lay the foundation for the admission of the ledger. On the facts here, the use of Robinson v. United States, 9 Cir., 33 F. 2d 238, is more appropriate than Ilseng v. United States, 9 Cir., 120 F. 2d 823, on which appellant relies.

Judgment affirmed.

Certificate.

Comes now George M. Bryant, counsel for Milton Mende, the petitioner herein, and certifies to the Court that the Petition for Rehearing After Denial of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is presented in good faith and not for delay and is for the purpose of calling to the attention of the court grounds available to the petitioner believed by counsel to be substantial and not previously presented to the court in the original Petition for Writ of Certiorari.

Dated February 1, 1961.

GEORGE M. BRYANT,

Counsel for Petitioner.